

A Zainudin bin Muhammad v ATSCO Ltd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-87 OF
2000

GOPAL SRI RAM, ALAUDDIN AND RICHARD MALANJUM JJCA
11 DECEMBER 2002

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Civil Procedure — Consent order — Variation — Objections to variation by respondent — No proper reasons advanced by applicant to justify variation of consent order — Consent order secured with the benefit of legal advice — Whether consent order ought to be varied

C

The applicant filed applications seeking to extend time for compliance with a consent order and for a stay or postponement of the order. The respondent objected to both applications. The crux of the matter was whether the applicant could vary the said order notwithstanding the objections of the respondent.

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Held, dismissing the applications:

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A consent order cannot be varied unless it is with the agreement of the other party or parties affected by it. Neither can a consent order be set aside unless the conditions are met; *Tio Chee Hing v Tractors Malaysia Bhd* [1973] 1 MLJ 66, *Maria Chia Sook Lan v Bank of China* [1976] 1 MLJ 245, *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895) 2 Ch D 273, and *Matthews v Munster* [1886-90] All ER Rep 251 (referred). In the instant case, the requirements were not met. The respondent objected to the applications. There was no allegation advanced to justify in law the setting aside of the consent order or its variation in any manner. There was no dispute that the consent order was secured with the benefit of legal advice to all parties involved. The assertions relied upon by the applicant in his applications were either issues that could have been raised before the consent order was agreed upon or were irrelevant (see p 371B-D).

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[Bahasa Malaysia summary]

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Pemohon telah memfailkan permohonan-permohonan untuk perlanjutan masa bagi menuruti satu perintah persetujuan dan bagi satu penggantungan atau penangguhan perintah tersebut. Responden membantah kedua-dua permohonan tersebut. Perkara yang dipersoalkan adalah sama ada pemohon boleh mengubah perintah tersebut tanpa mengambilkira bantahan responden.

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Diputuskan, menolak permohonan-permohonan tersebut:

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Satu perintah persetujuan tidak boleh diubah kecuali dipersetujui oleh pihak yang satu lagi atau pihak-pihak yang terjejas dengannya. Satu perintah persetujuan juga tidak boleh diketepikan kecuali syarat-syarat tersebut dipenuhi; *Tio Chee Hing v Tractors Malaysia Bhd* [1973] 1 MLJ 66, *Maria Chia Sook Lan v Bank of China* [1976] 1 MLJ 245, *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895) 2

Ch D 273, dan *Matthews v Munster* [1886-90] All ER Rep 251 (dirujuk). Di dalam kes semasa, keperluan-keperluan tersebut tidak dipenuhi. Responden membantah permohonan-permohonan tersebut. Tiada pernyataan yang diutarakan yang di dalam undang-undang menjustifikasikan perintah persetujuan tersebut diketepikan atau diubah. Tidak dipertikaikan bahawa perintah persetujuan tersebut telah diperolehi melalui nasihat guaman yang diterima oleh kesemua pihak yang terlibat. Kenyataan-kenyataan yang dipakai oleh pemohon di dalam permohonannya adalah isu-isu yang sepatutnya ditimbulkan sebelum perintah persetujuan tersebut dipersetujui atau tidak relevan (lihat ms 371B-D).

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Notes

For cases on variations of consent orders, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1415-1418.

Cases referred to

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Huddersfield Banking Co Ltd v Henry Lister & Son Ltd (1895) 2 Ch D 273 (refd)

Maria Chia Sook Lan v Bank Of China [1976] 1 MLJ 245 (refd)

Matthews v Munster [1886-90] All ER Rep 251 (refd)

Tio Chee Hing v Tractors Malaysia Bhd [1973] 1 MLJ 66 (refd)

E

Zainuddin bin Muhammad v Atsco Ltd & Anor [2002] 1 MLJ 1 (refd)

Appeal from: Civil Suit No D5-22-596 of 1999 (High Court, Kuala Lumpur)

K Kirubakaran (Kiru & Yong) for the appellant.

K Anantham (Skrine & Co) for the respondent.

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Richard Malanjum JCA (delivering judgment of the court): On 8 October 2002, after hearing submissions of learned counsel for the respective parties, we dismissed both the applications of the applicant. The first application was for an extension of time to comply with the terms of the consent order dated 5 June 2001, while the other was to amend the main prayer in the first application.

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Dissatisfied with our decision, the applicant has now filed in the Federal Court an application for leave to appeal.

Since our reason for dismissing both the applications is common we will therefore deal with them together.

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The original application by way of notice of motion dated 20 June 2001 relates to an earlier matter between the same parties in which this court has already given its decision (see *Zainuddin bin Muhammad v Atsco Ltd & Anor* [2002] 1 MLJ 1). Hence, we need not have to deal with the factual background as it has been dealt with therein.

I

The order asked for in the original application was for an extension of six months from 6 July 2001 as required in the consent order to make the

- A** first payment of US\$2m being part of the several payments agreed upon as a condition for the applicant to defend the suit against him. However, before it was heard, the applicant filed an application vide a notice of motion dated 19 July 2002 for leave to amend the main prayer sought for in the earlier motion. The proposed new prayer was for a stay or postponement of the consent order until the disposal of the suit against the applicant.
- B**

The respondent objected to both the applications.

- Now it is trite law that a consent order cannot be varied unless it is with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met (see *Tio Chee Hing v Tractors Malaysia Bhd* [1973] 1 MLJ 66; *Maria Chia Sook Lan v Bank Of China* [1976] 1 MLJ 245; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895) 2 Ch D 273; *Matthews v Munster* [1886–90] All ER Rep 251).
- C**

- In the instant case the requirements were not met. The respondent objected to the applications and there was no allegation advanced to justify in law the setting aside of the consent order or its variation in any manner.
- D** There was no dispute that the consent order was secured with the benefit of legal advice to all parties involved. The assertions relied upon by the applicant in both the motions were either issues that could have been raised before the consent order was agreed upon or that they were irrelevant. For instance, it is his averment that the hearing of the suit against him has been
- E** long due. However, that has nothing to do in him complying with the terms of the consent order. After all, he was given conditional leave to defend the suit. In any event, such a complaint is purely an administrative issue which his solicitors should be able to handle. As to the constraint of his travel overseas, that should be of no relevance in his inability to meet the terms of the consent order. In this day and age transmitting money from one country to another does not require the presence of the account holder. Indeed we would think that it could tantamount to having misled the other party into agreeing to the consent order when the applicant could have known of his limitation in meeting the terms therein. It would be quite unfair to the respondents that the applicant, after securing conditional leave to defend the suit, should be allowed to renege or delay in the compliance with the
- G** main terms of the consent order on the grounds which should have been within his personal knowledge at the material time.

For the reasons given we dismissed both the applications.

Applications dismissed.

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Reported by Andrew Christopher Simon

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